CRIMINAL APPEAL NO. 372 OF 1988.

Date of decision: 12.3.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Mr. M.J. Budhbhatti, advocate for appellant.
Mr. K.P. Raval, A.P.P. for respondent-State.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

---

March 12, 1996.

Oral judgment (Per Jain, J.)

The present appeal arises from Sessions Case No.48 of 1986 on the file of Sessions Judge, Amreli, wherein two accused were charged and tried for commission of offence punishable under Section 302 read with Section 34 of the Indian Penal Code for causing death of deceased Kesarbhai

Danabhai. According to prosecution case, the present appellant/original accused No.1, Balubhai Meraman Rabari and accused No.2 Bhagabhai Surabhai Bharvad, alongwith one child accused in fulfillment of their design attacked deceased Kesarbhai Danabhai in his field and caused death. The trial of child accused was separated and two accused i.e., Balubhai Meraman Rabari (present appellant) and Bhagabhai Surabhai Bharvad, were tried by the Sessions Court which, by its judgment dated 25.3.1988 convicted accused No.1, Balubhai Meraman Rabari, the present appellant, for the offence under Section 302 read with Section 34 and Section 447 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life whereas the original accused No.2, Bhagabhai Surabhai Bharvad, was acquitted. Aggrieved by the order of conviction, accused No.1, the present appellant, preferred this appeal.

This is a case wherein prosecution has examined as many as 16 witnesses. But for the purpose of the appeal, in our view, the oral testimony of two eye witnesses i.e., P.W.1, Ghelabhai Bhima, Ex.24 and P.W.2, Meru Ram, Ex.25 and Panch witness P.W.3, Ram Varjang, Ex.26 would be very much relevant and rightly Mr. Budhbhatti, the learned advocate for the appellant, has referred to the evidence of these three witnesses only relieving the Court to look into the voluminous evidence of other witnesses. P.W.1, Ghelabhai Bhima, is an eye witness and also complainant, who lodged FIR, Ex.62. According to him, the incident occurred on 2.4.1986 at 10.45 P.M.,when he alongwith P.W.2, Meru Ram and deceased Kesurbhai Dana, were sleeping in the farm. According to this witness, a third person, Arjan Mala, was also in their company working in the field irrigating crops. On that day, after attending to their routine activities they all retired and went to sleep. The deceased Kesurbhai Danabhai was sleeping in cot in open space, that is, Vada, whereas he alongwith P.W.2, Meru Ram, was sleeping inside the pump room and the third person, Arjan Mala, was working in the field irrigating crop. As he heard some noise and commotion he and P.W.2 Meru Ram, came out of the pump room and tried to ascertain with the help of torch as to what it is and they saw the present appellant alongwith two others assaulting deceased Kesurbhai Danabhai. As alleged, the appellant was armed with stick embedded with iron rings whereas other one was armed with simple stick. They assaulted the deceased by giving successive blows on various parts of the body but on being challenged by them made their escape good from the place of offence. Thereafter he and P.W.2 reached near the deceased who was seriously injured. They noticed serious injuries on

head, legs and hands with profuse bleeding. Assessing the situation and with a view to get prompt medical aid to the injured, the injured was removed in tractor from the place where he was alleged to have been assaulted and was taken to Primary Health Centre at Ghantwad where Dr. P.S. Vekria, after preliminary examination, advised to take him to Amreli Hospital. Accordingly the injured was taken to Amreli Hospital where on seeing the doctor declared him dead. This witness further states that he and P.W.2 both jointly lifted and placed the injured in the tractor and in that process their clothes were also stained with blood.

The evidence of P.W.2 is also almost consistent on all the points and falls in line with the case of the prosecution.

P.W.3, Panch witness in whose presence scene of offence panchnama is drawn, has been examined at Ex.26. According to him, heap of cow dung was on the main road outside the "Vadi". Blood stains and two blood stained pieces of sticks were found on said head of cow dung, outside the Vadi. The P.W.2 has also admitted in cross-examination that heap of cow dung is situated on the main road outside the Vadi. Thus, the evidence about location of cow dung heap gets corroboration with each other i.e., P.W.2 and P.W.3. The P.W.1, eye witness, the complainant and nephew of deceased, of course, does not make positive statement about location of cow dung heap but in para 6 of his cross-examination he does refer to the distance and states that the cow dung heap is situated at a distance of 50 ft. from the cot where the deceased Kesurbhai was lying.

As a cardinal rule it is the duty of prosecution to make fair investigation and bring on record all material evidence connecting the accused with commission of offence. The incident took place at about 10.45 P.M. in an agricultural farm. There is nothing on record to suggest that the place where the incident took place was having lighting facility. On the contrary, from the evidence of eye witnesses one can safely infer that as there was no lighting facility the eye witnesses saw the accused in torch light. The fact that the eye witness saw the assailants in torch light is very much relevant material to establish identity of accused. In fact, whether the eye witnesses did use torch light to identify and see would be a relevant fact and deserves to be proved by cogent and concrete evidence. Therefore, it is the duty of the prosecution to recover and place on record said torch light with which the eye witnesses

alleged to have witnessed the occurrence, assault and the assailants. But in this case the prosecution has not recovered any such torch from the possession of P.W.1. Undoubtedly, this is a relevant and material evidence for establishing identity of accused. Absence of such relevant and material evidence ipso facto casts doubt about the identity of accused and consequent involvement in the commission of offence.

P.W.1 and P.W.2 have categorically stated that while assisting the injured for taking him to hospital for treatment their clothes were also drenched in blood. Both of them have also admitted in evidence that the Investigating Officer did tell them to produce clothes but neither they produced their blood stained clothes nor the investigating agency seized for investigation. For the sake of repetition, we say that this is an important and material piece of evidence to establish presence of eye witnesses. In absence of seizure of blood stained clothes of eye witnesses, a doubt is created about presence and their being witness to the incident. As regards omission to seize torch and blood stained clothes, we find no explanation much less satisfactory explanation by the prosecution and thus presence of eye witnesses and the identification by them becomes highly doubtful and does not inspire confidence and renders the entire story unreliable. On this point our attention is drawn to decision in the case of Manzoor v. State of U.P., AIR 1983 SC 295, which says that the torch alleged to have been used by witness for seeing the incident and identifying the accused is a relevant piece of material evidence and in the absence of seizure the case becomes shrouded with mystery.

Mr. Budhbhatti, learned advocate for the appellant, has invited our attention to a material discrepancy which goes to the genesis of the case. Prosecution witness Nos.1 and 2 are consistent about the place of incident, that is, on a cot and within the four corners of the Vadi. As per prosecution case, at the relevant time, the deceased Kesurbhai Danabhai was sleeping in the cot. All the accused duly armed with sticks came there, besieged and then violently attacked and caused injuries on various parts of the body, including head, hands and legs. Both the witnesses are consistent to say that with such injuries the deceased was having profuse bleeding. It is also the evidence that till the deceased was removed to hospital he was lying in the cot. This evidence if accepted as is, would suggest that after the assault, till deceased was removed to hospital he was lying in the cot with profuse bleeding, so the cot or the

soil must have drenched with blood but unfortunately no blood stains are found either on ground or on cot as is evident from the cross-examination of P.W.2 as well as scene of offence Panchnama, Ex.27. On the contrary, as evident from the testimony of P.W.3, Panch Witness, Rambhai Varjang, Ex.26 and Panchnama Ex.27, blood stains were found on the heap of cow dung located outside the Vadi, on the main road. The prosecution has not been able to explain presence of blood on said heap of cow dung located at a distance and absence of blood marks at the place of offence as per eye witnesses. In absence of any satisfactory explanation, it casts suspicion and suggests of the view that in suppression of genesis and real facts, leading to infer that the story is fabricated with a view to rope in the accused who admittedly are in inmical terms with deceased. The presence of blood marks on the heap of cow dung outside the Vadi at a distance of 50 ft., and non-explanation thereof also leads us to hold that the place of offence is not the one which is alleged by the eye witnesses but is different and has been deliberately suppressed by the prosecution. In our view, this amounts to suppression of genesis of the occurrence and, therefore, the case of prosecution as advanced does not inspire confidence and becomes untrustworthy or unreliable. On the face of record it appears that the genesis of occurrence is suppressed and the truth remains unfolded.

In a criminal trial ocular evidence relating to causing injuries must get corroboration from medical evidence. Prosecution has examined as many as two doctors in support of prosecution case, that is, P.W.12 and P.W.15. But for our purpose, evidence of P.W.15, Dr. Rasiklal Bavchandbhai, Ex.50, would be material and relevant. This witness did the post-mortem examination on the body of deceased Kesurbhai Danabhai. While giving details of external and internal injuries found, states that injury Nos.1 and 2 are possible by sharp cutting instrument and somewhat hard substance whereas injury Nos.3 to 7 are possible by hard and blunt substance. When the case of prosecution is that the accused were armed with lathi only then all the injuries sustained should be reflecting use of stick only, a hard and blunt substance. But the doctor says that two of the injuries are purported to have been caused by sharp cutting instrument. To this extent the oral testimony of ocular witness does not get corroboration from medical evidence and thus a doubt is created about the very genesis of occurrence, nature of weapons used and involvement of persons. If use of sticks as alleged is accepted then injuries possible by sharp cutting instrument could not have been found on the

dead body and thus creates doubt about the weapons used and consequent involvement of the accused. Further more, on perusal of post-mortem notes, Ex.52 as well as P.W.15 Doctor's evidence, Ex.50, we find as many as seven external injuries but none of the injury is found on the head whereas both the eye witnesses are consistent that blows were given on head resulting in profuse bleeding. This incosistency between the oral evidence and medical evidence prompts us to hold that the eye witnesses are not telling truth, and either did not witness the incident or are not unfolding the genesis only with a view to falsely rope in the accused owing to admitted enmity.

For the aforesaid reasons, we are of the view that the learned Sessions Judge has committed error in appreciating the evidence and placing heavy reliance upon the unreliable and untrustworthy witnesses who incidently happen to be interested witnesses. Consequently, the finding of trial Court deserves to be up set.

We accordingly allow the appeal and set aside the order of sentence and conviction passed by the learned Sessions Judge and acquit the appellant. Since the present appellant/original accused No.1 is in jail, is ordered to set at liberty forthwith if not required in connection with any other case.